No. 83-40

IN THE

Supreme Court of the United States

October Term, 1983

MARY HEDLEY, HERB MCFARLAND, ASBERRY RAINEY, JR., FRANK SERPE and FRANK STAFFORD,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION FOR RESPONDENT TRANS WORLD AIRLINES, INC.

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Questions Presented.

A. Was the district court's refusal to permit certain burdensome worldwide discovery by plaintiffs a proper exercise of its discretion?

B. Is there a conflict among the Courts of Appeals regarding the standard for abuse of discretion by trial judges in discovery matters?

C. Was it an abuse of discretion for the trial judge to discredit statistical evidence derived from a sample size of twenty?

D. Were petitioners denied due process under the United States Constitution because the trial judge allegedly referred during the trial to a statistics treatise not introduced in evidence?

List of Trans World Airlines, Inc.'s Parent Company and Subsidiaries.

Parent Company: TRANS WORLD CORPORATION ("TWC").

Subsidiaries of TWC:

Trans World Airlines, Inc. ("TWA") (81.34% Ownership);
Hilton International (100% Ownership);
Canteen Corporation (100% Ownership);
Century 21 (100% Ownership); and
Spartan Food Systems (100% Ownership).

Subsidiaries of TWA:

None.

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APPENDIX A.

TABLE OF AUTHORITIES

Federal Statute

Federal Rules

No. 83-40

IN THE

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BRIEF IN OPPOSITION FOR RESPONDENT TRANS WORLD AIRLINES, INC.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Trans World Airlines (hereinafter referred to as "TWA"), submits the following brief in opposition to the Petition for a Writ of Certiorari filed by Mary Hedley, Herb McFarland, Asberry Rainey, Jr., Frank Serpe and Frank Stafford (hereinafter referred to as "plaintiffs").

Statement of the Case.

On April 8, 1982, the United States District Court, Central District of California, following an eight-day trial without a jury, held that TWA did not discriminate against

plaintiffs in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (hereinafter referred to as the "ADEA"), by reassigning them from management to non-management positions pursuant to a January 1977 reorganization within TWA's Los Angeles reservations office, and thereafter by refusing to promote them. Plaintiffs' motion for a new trial was denied, and on May 16, 1983, the United States Court of Appeals for the Ninth Circuit unanimously affirmed the district court's decision. In the Petition for a Writ of Certiorari herein, plaintiffs seek review by this Court on three principal grounds.

First, plaintiffs claim that the district court's discretionary denial of burdensome worldwide discovery denied them an adequate opportunity to prove their case, and was contrary to this Court's discovery decision in *Hickman v. Taylor*, 329 U.S. 495 (1947). (Pet., pp. 5-9.) Second, plaintiffs claim that the district court improperly discredited their statistical experts' testimony because it was derived from a sample size of twenty. (Pet., pp. 10-12.) Finally, they argue that the district court's alleged reference during the trial to a statistics treatise not introduced in evidence denied them due process. (Pet., pp. 13-15.)

As demonstrated below, the lower courts fully considered and correctly decided the issues herein. In any event, the petition does not present an important question of federal law upon which there are conflicting decisions by the Courts of Appeals, or which should be decided by this Court. Accordingly, this Court should dismiss the petition and let the lower courts' well reasoned judgments stand.

Statement of Additional Facts.

The initial issue raised by the petition centers around plaintiffs' first set of interrogatories. They were served on August 16, 1979, and contained fourteen interrogatories.

TWA responded to all fourteen interrogatories, but gave limited answers in accordance with stated objections to three interrogatories. (ER 56, 76-80; SER 263-66.)[1] The contested interrogatories sought to discover *all* complaints of age discrimination filed against TWA since 1967 with administrative agencies, in courts, and those presented to TWA by union representatives. TWA objected because, in the context of a non-class action, those interrogatories were burdensome, irrelevant and not likely to lead to the discovery of relevant evidence in that they: (1) sought information relating to complaints filed against TWA on a worldwide basis rather than solely for the Los Angeles reservations office where plaintiffs were employed and where the alleged discriminatory acts occurred; (2) sought information regarding complaints presented by union representatives even though plaintiffs were neither union members nor represented by a union; and (3) sought information about complaints filed in a twelve year period from 1967 to 1979 even though the alleged discriminatory acts began in 1977. TWA answered those three interrogatories by providing the requested information for its Los Angeles reservations office only and for the four-year period prior to the January 1977 reorganization.

Plaintiffs moved to compel further answers to the contested interrogatories. In support of its opposition brief, TWA presented uncontroverted declaration testimony demonstrating the irrelevance and undue burden of these interrogatories. Thus, TWA showed that it is a worldwide air carrier with over 50 domestic and 100 worldwide facilities,

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[1]All references to "ER" and "SER" refer to portions of documents in the Excerpt of Record and Supplemental Excerpt of Record filed with the United States Court of Appeals for the Ninth Circuit. Similar references are used throughout this brief, and the pages referred to are attached hereto as Appendix A.

and that it employed approximately 40,000 people. It was shown that TWA's reservations sales office employees, including plaintiffs, were not and had never been unionized. TWA also established that in order to obtain the requested information, all of its employees' personnel files would have to be searched, and that it would require the full-time effort of three employees for one month to complete this task. (ER 83-85.)

On November 19, 1979, the district court issued its order denying plaintiffs' motion to compel on the ground that the interrogatories were "burdensome and that the plaintiffs [have] made an insufficient showing that the information requested therein is relevant or likely to lead to the discovery of relevant evidence." (ER 93.) The Ninth Circuit affirmed this order, finding that plaintiffs "have failed to show that the court's decision was based on a clear error of judgment." (Pet., App. A, p. 1.)

Plaintiffs' unsuccessful attempt at trial to prove their case through statistical evidence is the basis for the remainder of their petition. The district court found that their two experts' statistical testimony was biased and "not very persuasive." (Pet., App. B, pp. 15, 20, 24.) The district court also concluded that their testimony "fell on its own weight" (SER 9-10), and that "there is not one shred of competent credible evidence, direct evidence, that the defendant engaged in any way toward these plaintiffs on the basis of age discrimination motivation." (Pet., App. B, p. 23.)

On appeal, the Ninth Circuit rejected plaintiffs' argument that the district court erred in giving the testimony of their statistical experts little weight. The Ninth Circuit stated that:

> "The [district] court was entitled to conclude that statistical evidence derived from an extremely small universe has little predictive value. . . . More fundamentally, the trial court is in the best position to appraise

the credibility of witnesses. . . .

"Even if we assume the court's finding was clearly erroneous, it was harmless error, because appellants failed to prove that age was a 'determining factor' in TWA's actions, . . . or to demonstrate that TWA's articulated legitimate business reasons were pretextual." (Footnotes and citations omitted.) (Pet., App. A, p. 2.)

ARGUMENT.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. The District Court's Discovery Order Was Neither an Abuse of Discretion nor Inconsistent With This Court's Decision in Hickman v. Taylor, and There Is No Conflict Among the Circuits With Respect to Discovery.

In challenging the district court's discovery order, plaintiffs strain to argue to this Court that the order is symptomatic of the erosion of the decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), by allegedly conflicting lower court decisions, and that the order denied them an adequate opportunity to prove age discrimination. Both of these untenable arguments are grounded upon a faulty premise — that there are no limits to the scope of discovery. As illustrated below, however, issues of relevancy and burden affect the scope of discovery. Regarding plaintiffs' proposition that there exists a split in the Courts of Appeals on the standard for abuse of discretion by trial judges in discovery matters, the petition cites no supporting cases.[2]

The Federal Rules of Civil Procedure and the decision in *Hickman v. Taylor* justify the limits on discovery ordered herein. Rule 26(b)(1) limits discovery to matters "relevant to the subject matter," and Rule 26(c) provides that a court may make a protective order "which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the

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[2]The cases in the treatise's footnote which plaintiffs cite as evidence of a conflict in the circuit courts (*see* Pet., p. 6), merely illustrate that faithful application of the *Hickman* rationale will result in either a granting or denial of discovery depending upon the facts of each case. None of those cases cast doubt upon the viability of the *Hickman* decision or the consistency of its application by the circuit courts.

following: (1) that the discovery not be had . . ." In *Hickman*, this Court stated that "discovery, like all matters of procedure, has ultimate and necessary boundaries." 329 U.S. at 507.

In the instant case, plaintiffs stipulated that TWA had legitimate business reasons for the reorganization (*see* Pet., App. B, pp. 7-8), and they have conceded that the allegedly discriminatory reorganization employment decisions were made by Los Angeles reservations office managers. (Pet., p. 3.) It is well settled that "in the context of investigating an individual complaint [of employment discrimination], the most natural focus is upon the source of the complained of discrimination — the employing unit or work unit." *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 592 (5th Cir. 1978). *See also Hinton v. Entex, Inc.*, 93 F.R.D. 336, 337 (E.D. Tex. 1981) (discovery limited to facility where plaintiff employed); *EEOC v. Prestolite Battery Div. of Eltra Corp.*, 14 F.E.P. Cases 1634, 1636 (W.D. Okla. 1976) (same).

Likewise, the limitation of plaintiffs' discovery to a four year period prior to the alleged discriminatory acts is consistent with the reasoning of *Hickman* and the discovery rules. *See, e.g., James v. Newspaper Agency Corp.*, 591 F.2d 579, 582 (10th Cir. 1979) (discovery limited to a four year period); *Ochoa v. Monsanto Co.*, 473 F.2d 318, 319 (5th Cir. 1973) (per curiam) (discovery limited to six months before and after employment interview); *EEOC v. Magnetics Div. of Spang Industries*, 13 F.E.P. Cases 191, 191-92 (W.D. Pa. 1976) (discovery limited to 3½ years prior to the alleged discriminatory act).

Plaintiffs assert that by not obtaining and then introducing in evidence information about other charges or lawsuits against TWA alleging age discrimination, they were denied an adequate opportunity to prove their case. This assertion

is both wrong and patently misleading. Completely unrelated age discrimination charges or lawsuits against TWA since the ADEA's enactment arising out of employment actions unrelated to the January 1977 reorganization in other facilities by other managers would not have constituted competent evidence in this case. Plaintiffs cannot credibly argue that they were prejudiced by the order limiting their discovery in the first instance to the facility where they were employed and where all the employment decisions were made, and to a period four years prior to the alleged discriminatory acts. This point is underscored by the fact that although plaintiffs' motion to compel was denied early in the litigation (*i.e.*, 11 months after the filing of the complaint and 3 months after plaintiffs began discovery), they did not later attempt to justify a broadening of their discovery by showing or claiming nationwide discrimination.

In sum, contrary to plaintiffs' assertion (*see* Pet., p. 9), this is not a case where a "full and fair opportunity" to prove a violation of the ADEA was denied, and viewed reasonably, the district court's discovery order played an insignificant role in this case.

B. The Trial Court's Finding That Plaintiffs' Statistical Evidence Was Unpersuasive Was Not an Abuse of Discretion, and Does Not Present an Important Question of Federal Law.

It is well established under federal law that where the credibility of witnesses, including experts, is involved and the trial court has had an opportunity to observe and judge that credibility, the court's evidentiary evaluations should not be overturned unless clearly erroneous. *See* Fed. R. Civ. P. 52(a); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982); *United States v. Smith*, 625 F.2d 278, 279-

80 (9th Cir. 1980). Applying the "clearly erroneous" standard, the Ninth Circuit affirmed the district court's findings regarding plaintiffs' experts' testimony. In their attempt to present a question of federal law for review in the face of this case authority, plaintiffs make arguments which mischaracterize the district court's decision and misconstrue the role of experts.

First, plaintiffs argue that because their two experts' statistical testimony was not countered by an expert for TWA, the district court was obliged to accept the experts' opinions (*i.e.* enter judgment for plaintiffs). Plaintiffs' experts' field of knowledge is statistics, not the ultimate issue of whether age discrimination occurred. Further, the mere fact that TWA did not call an expert did not make plaintiffs' experts credible. Indeed, the district court after observing the testimony of Drs. Pfeffer and Driver, concluded that it "fell of its own weight." (SER 9-10.)

For example, Dr. Pfeffer admitted that if the supervisors selected for demotion were analyzed based on the criteria of height or weight or color by applying the same statistical test he utilized when he examined the reorganization for age bias, virtually identical results were obtained. (ER 246-50.) Thus, the demotions were statistically just as likely to have been the result of the height, weight or color of the supervisors as their age. The district court recognized this flaw in Dr. Pfeffer's opinion and concluded that:

> "First, the samples here involved are such as not to afford a persuasive basis and, indeed, it develops that the statistical analysis would suggest that there might well have been numbers of other factors besides age, but of a similar character, that might have entered into the determinations." (Pet., App. B, p. 24.)

Turning to Dr. Driver, the district court found that "[t]he hypotheses and assumptions upon which [he] . . . predi-

cated his opinion were clearly erroneous." (Pet., App. B, p. 21.)

Second, plaintiffs argue that the district court rejected their experts' testimony because the sample size upon which certain opinions were derived was too small. To the contrary, the court's decision clearly reveals that the experts' testimony was not rejected (*see* Pet., App. B, p. 25), but simply found "not very persuasive." (Pet., App. B, p. 24.)

Relying upon the erroneous premise that the district court rejected their statistical evidence because the group being analyzed was too small, plaintiffs argue that since the ADEA applies to employers with twenty or more employees (*see* 29 U.S.C. § 630(b)), a sample size of twenty cannot be deemed too small for reliable statistical analysis. In so arguing, plaintiffs fail to recognize that different considerations are involved in determining a reliable sample size for statistical purposes from those involved in establishing jurisdictional limits. Plaintiffs fail to identify any evidence that Congress, in establishing the jurisdictional parameters of the ADEA, also intended to establish an inexorable rule for trial courts in reviewing statistical evidence and thereby overturn this Court's mandate to such courts to evaluate the credibility of witnesses and weigh evidence. *United States v. Yellow Cab Co.*, 338 U.S. 338 at 341-42.

The weight to be given statistical evidence depends on "all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 (1977). Thus, although no bottom line can be set to determine how large a sample size must be to be reliable, sample size is clearly a relevant factor to be evaluated by the trier of fact (such as the district court below) when considering statistical evidence. *Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977). In any event, plaintiffs err in asserting that the

"[r]ejection of statistical evidence in employment discrimination cases because the group being analyzed was too small," has not occurred with respect to groups as large as twenty. (Pet., p. 11.) In *White v. City of San Diego*, 605 F.2d 455, 461 (9th Cir. 1979), for example, statistical evidence based on groups of both 28 and 22 was found "too small to be meaningful."

C. Any Reference by the District Court to a Statistics Treatise Was Entirely Proper and in No Way Violated Plaintiffs' Rights to Due Process.

Although not argued below, plaintiffs now assert that the district court's alleged reference at trial to a statistics treatise not in evidence violated their due process rights under the United States Constitution.[3] Plaintiffs cannot nor do they cite any cases in support of this argument. This is because it is well established under federal law that a trial court is entitled to take judicial notice of such "learned treatises."[4] *United States v. 1,078.27 Acres of Land*, 446 F.2d 1030, 1034 (5th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) ("we are entitled to rely upon the experienced trial judge to separate the wheat from the chaff and thus consider only such matters as he might properly judicially notice"); *Purer & Co. v. Aktiebolaget Addo*, 410 F.2d 871, 876 (9th Cir. 1969), *cert. denied*, 396 U.S. 834 (1970) ("[t]he presumption on appeal is that the trial judge disregarded incompetent evidence and relied upon competent evidence."); *Application of Hartop*, 311 F.2d 249, 253 (C.C.P.A. 1962)

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[3]While plaintiffs argued to the lower courts that the district court's alleged reference to the statistics treatise was error, they did not assert any violation of the United States Constitution.

[4]Plaintiffs' argument that the statistics treatise was inadmissible hearsay is without merit. The book is a "learned treatise" and, therefore, falls within the exception to the hearsay rule found in Federal Rule of Evidence 803(18).

(court properly judicially noticed two standard reference works by name and relied upon them in reaching a decision.)

None of the cases cited by plaintiffs (*see* Pet., p. 13) are controlling here because they either do not stand for the proposition asserted by plaintiffs or are inapposite. For example, in *People v. Archerd*, 3 Cal. 3d 615, 638, 91 Cal. Rptr. 397, 477 P.2d 421 (1970), the court specifically found that "[i]t was proper for the [trial] court to consult textbooks concerning the nature of the properties of insulin, as it is entitled to take judicial notice on its own of the expertise of the doctors testifying at the trial." Neither *Hartford Accident & Indemnity Co. v. WCAB*, 132 Cal. App. 3d 796, 183 Cal. Rptr. 440 (1982) nor *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), address the issue of judicial notice of learned treatises.

Most importantly there is no evidence of unfairness here; nothing in the record indicates that the district court relied upon the statistics treatise in making its findings. On the contrary, the court's extensive discussion of the evidence presented by each party (*see* Pet., App. B. pp. 14-27) belies any inference that it reached its decision based on extrinsic evidence.

Conclusion.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN P. PEPE,

Attorney for Respondent
Trans World Airlines, Inc.

Of Counsel:

T. WARREN JACKSON,
O'MELVENY & MYERS.

August 4, 1983.

APPENDIX A.

Defendant's Answers and Objections to Plaintiffs' First Set of Interrogatories.

United States District Court, Central District of California.

Mary Hedley, Herb McFarland, Asbery Rainey, Jr., Frank Serpe and Frank Stafford, Plaintiffs, vs. Trans World Airlines, Inc., Defendant. Case No. CV 79-0907 RJK (Tx).

INTERROGATORY NO. 12

With respect to all complaints of age discrimination against you through an administrative body (*e.g.*, a state employment agency of the U.S. Department of Labor) since 1967, please furnish the following information:

a. Names of complainant and date of birth.

b. Name of agency handling the complaint and identification of proceeding (*e.g.*, name and number).

c. Nature of complaint, *i.e.*, job involved, location, date of alleged discrimination, what action by you was complained of (*e.g.*, termination, demotion, forced retirement or other).

d. Is the complaint still being handled by the agency, and if not, was it settled while with the agency, abandoned by the complainant, completed by the agency and followed by a lawsuit, or none of the foregoing. (If none, state what conclusion occurred).

OBJECTIONS TO INTERROGATORY NO. 12

See objections to Interrogatory No. 1, which by this reference are incorporated herein.

Defendant further objects to Interrogatory No. 12 insofar as it requests information for a period prior to January 1, 1973 on the following grounds:

Plaintiffs' charges of age discrimination were filed with the Department of Labor on January 23, 1977. Defendant

submits that events which occurred more than four years prior to said charges are irrelevant to this action. Further support of this four-year cutoff date is that plaintiffs have not filed any charges of age discrimination with respect to this earlier period and that the Age Discrimination in Employment Act provides for an even shorter period, namely, two years and three years in the case of willful violations, with regard to the statute of limitations for accrual of damages. Therefore, the interrogatory seeks information that is not relevant to the subject matter of this lawsuit and will not tend to lead to the discovery of admissible evidence; and for the reasons hereinabove stated the interrogatory is overbroad and therefore burdensome and oppressive.

Defendant for the purpose of the response to this interrogatory and without waiving the foregoing objections shall answer for the period after January 1, 1973.

ANSWER TO INTERROGATORY NO. 12

Defendant is informed and believes, at present, based on a review of its personnel files at the Los Angeles Reservations Office and its facility at Los Angeles International Airport ("LAX") that except for the plaintiffs herein no complaints of age discrimination have been filed.

INTERROGATORY NO. 13

With respect to all complaints of age discrimination against you made in a lawsuit since 1967, please furnish the following information:

a. Name of complainant and date of birth.

b. Court where case was filed and all other courts in which it was pursued along with the case name and number in each court.

c. Nature of complaint, *i.e.*, job involved, location, date of alleged discrimination, what action by you

was complained of (*e.g.*, termination, demotion, forced retirement or other).

d. Is the suit still pending, and if not, was it settled, abandoned, tried, or appealed?

e. If the case was settled, tried, or appealed, state briefly the terms of settlement, judgment of the trial court, and result on appeal. (If appeal resulted in published opinion, give citation.)

OBJECTIONS TO INTERROGATORY NO. 13

See objections to Interrogatory No. 12 which by this reference are incorporated herein.

ANSWER TO INTERROGATORY NO. 13

Defendant is informed and believes, at present, based on a review of its personnel files at the Los Angeles Reservations Office and LAX that except for the plaintiffs herein no lawsuits alleging age discrimination by defendant have been filed.

DATED: October 8, 1979.

O'MELVENY & MYERS
T. WARREN JACKSON
By /s/ Theo. Warren Jackson
T. Warren Jackson
Attorneys for Defendant
Trans World Airlines, Inc.

Defendant's Supplemental Answers and Objections to Plaintiffs' First Set of Interrogatories.

United States District Court, Central District of California.

Mary Hedley, Herb McFarland, Asbery Rainey, Jr., Frank Serpe and Frank Stafford, Plaintiffs, vs. Trans World Airlines, Inc., Defendant. Case No. CV 79-0907 RJK (Tx).

The interrogatories and responses hereto should be deemed incorporated by this reference to Defendant's Answers and Objections to Plaintiffs' First Set of Interrogatories.

INTERROGATORY NO. 14

Have you received any complaints of age discrimination which were presented to you by a union representative since 1967?

OBJECTIONS TO INTERROGATORY NO. 14

Defendant objects to Interrogatory No. 14 on the grounds, that it is vague insofar as it does not indicate the locational frame of reference. Defendant for the purpose of the response to this interrogatory and without waiving this objection shall refer to its reservations office at 1543 Shatto Street, Los Angeles, California. In addition, defendant objects to this interrogatory on the grounds that insofar as it seeks information regarding a union representative it is not relevant to the subject matter of this lawsuit and does not tend to lead to the discovery of admissible evidence since no union is a party to this action and plaintiffs were neither represented by nor members of any union at all times relevant herein.

Defendant further objects to Interrogatory No. 14 insofar as it requests information for a period prior to January 1, 1973 on the following grounds:

Plaintiffs' charges of age discrimination were filed with the Department of Labor on January 23, 1977. Defendant

submits that events which occurred more than four years prior to said charges are irrelevant to this action. Further support of this four-year cutoff date is that plaintiffs have not filed any charges of age discrimination with respect to this earlier period and that the Age Discrimination in Employment Act provides for an even shorter period, namely, two years and three years in the case of willful violations, with regard to the statute of limitations for accrual of damages. Therefore, the interrogatory seeks information that is not relevant to the subject matter of this lawsuit and will not tend to lead to the discovery of admissible evidence; and for the reasons hereinabove stated the interrogatory is overbroad and therefore burdensome and oppressive.

Defendant for the purpose of the response to this interrogatory and without waiving the foregoing objections shall answer for the period after January 1, 1973.

ANSWER TO INTERROGATORY NO. 14

No.

DATED: October 16, 1979

O'MELVENY & MYERS
T. WARREN JACKSON
By /s/ Theo. Warren Jackson
T. WARREN JACKSON

Attorneys for Defendant
Trans World Airlines, Inc.

Declaration of James L. Kessler.

I, JAMES L. KESSLER, declare and testify as follows:

If called to testify, I could and would testify to the following facts which are within my personal knowledge:

1. I am employed by Trans World Airlines, Inc. ("TWA") as Regional Manager Employment and Personnel Administration, 7001 World Way West, Los Angeles, California. My duties include maintenance of personnel records, recruiting, placement and affirmative action for TWA's Western Region. In addition, I have responsibility for assisting TWA's legal counsel in the conduct of litigation in the Western Region, including the instant litigation.

2. TWA is a worldwide air carrier with facilities in over 50 cities domestically and over 100 cites worldwide. TWA maintains eight Reservation Sales Offices in the United States, which are responsible for booking airplane seat reservations for the travelling public, located in San Francisco, Los Angeles, St. Louis, Chicago, Pittsburgh, Boston, New York and Philadelphia.

3. System-wide, the area to which the plaintiff's interrogatories are directed, TWA employs approximately 40,000 employees. TWA employs approximately 2,000 people in the eight domestic reservation offices. Almost without exception, each of TWA's different facilities particularly the Reservation Sales Offices, involves independent and separate management and control.

4. In or about January 1977, a reorganization at TWA's Los Angeles Reservation Sales Office was effected, pursuant to a system-wide plan. This reorganization resulted in the reclassification of the plaintiffs herein from supervisory to nonsupervisory positions. The foregoing reorganization was also independently implemented at TWA's other domestic reservation offices. Thus, the process that led to

the reclassification of plaintiffs herein was conducted solely at the Los Angeles Reservation office.

5. Certain of TWA's employees are represented for the purpose of collective bargaining by one of four unions, as follows:

International Association of Machinists and Aerospace Workers: Fleet service helpers, mechanics, ramp service, flight kitchen and aircraft cleaning employees;

Air Line Pilots Association: pilots;

International Federation of Flight Attendants: flight attendants; and

Transport Workers Unions: flight dispatchers.

Employees in TWA's domestic area reservation offices are not represented by a union.

6. TWA has extensive personnel records maintained in 12 different locations throughout the United States. Almost without exception, employee personnel records are maintained at the employee's current work location. TWA also has extensive computer records regarding all of its employees, maintained in Kansas City, Missouri, however, records such as salary, promotion, demotion and transfer information for the period prior to 1970 are not maintained.

7. I have read plaintiffs' first set of interrogatories, TWA's answers and objections to said interrogatories and plaintiffs' motion to compel answers to interrogatories. In order to compile the information requested by the plaintiffs regarding all TWA's facilities, employees and unions for the requested period, a search of all TWA employees' personnel files would have to be conducted; TWA estimates that it will require the full-time effort of three of its regular employees for approximately one month.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Los Angeles County, California, this 8th day of November, 1979.

/s/ James L. Kessler
James L. Kessler

Civil Minutes — General.

United States District Court, Central District of California.

Case No. CV 79-907-RJK. Title Hedley et al. v. Transworld Airlines. Date 11/19/79

Present: Hon. Robert J. Kelleher, Judge. James H. Haggard, Deputy Clerk. N/A, Court Reporter. Attorneys Present for Plaintiffs: N/A. Attorneys Present for Defendants: N/A.

Proceedings: MINUTE ORDER

The matter having come before the Court and having been taken under submission, and the Court having considered the record and being fully advised, and good cause appearing therefor, hereby DENIES Plaintiff's Motion to Compel Answers to Interrogatories on the ground that such interrogatories are burdensome and that Plaintiff has made an insufficient showing that the information requested therein is relevant or likely to lead to the discovery of relevant evidence.

The clerk shall mail a copy of this Order to counsel.

cc: Amil Roth
Suite 1204
1888 Century Park East
Los Angeles, CA 90067

T. Warren Jackson
O'Melveny & Myers
611 West Sixth St.
Los Angeles, CA 90017

Reporter's Transcript: Remarks From the Court.

. . . . . .

in this cause, your Honor.

THE COURT: Well, I might tell you that the Court during the course of and at the conclusion of Dr. Driver's —

MR. ROTH: I was referring to — apologies.

THE COURT: Let me just say that during the course of it and at the conclusion of it, the Court contemplated on its own motion a reversal of a prior ruling, and that is affording to the plaintiff an opportunity to call its rejected expert on statistics and otherwise, McMenamin, or whatever his name was, or otherwise.

One of the bafflements to the Court which has been expressed previously is the kind and character of pretrial preparation of this case and the reduction thereof to documents upon which the case could be informatively tried by the Court. One of the areas is the expert opinion. The Court will say, and this is prompted by your comment, Mr. Roth, concerning Dr. Driver, it not having been controverted, that the Court concluded that Dr. Driver's testimony fell on its own weight. And, therefore, it expressed as it did some comments in that regard. And because it took that view, it abandoned any thought of its own motion of saying to the defendant it could bring in some expert testimony.

MR. ROTH: I had thought I addressed my remarks to the Court with respect to Dr. Pfeffer. At the opening week of trial herein, one of the first witnesses was Dr. Irving Pfeffer, who testified as an expert statistician.

THE COURT: Yes. Let me just say the Court well recalls that, and the comments just made with respect to Dr. Driver were made in contemplation of Dr. Pfeffer having testified in substantially the same manner; that is, as an

expert, as a statistician. And the comments made as purportedly applied solely to Dr. Driver applied to Dr. Pfeffer also.

MR. ROTH: In light of the Court's explanation with respect to Dr. Pfeffer and it is the position of plaintiffs' counsel that plaintiffs accept the Court's observation that the Court doubts that the Court's decision would be changed by allowing plaintiffs further to argue their case, and unless the Court wishes guidance in any particular matter, we are willing to let findings and conclusions be furnished in whatever manner the Court chooses.

THE COURT: And that the matter stands submitted thereupon, is that your suggestion?

MR. ROTH: Yes, your Honor.

THE COURT: Yes.

What's the defendant's position?

MR. JACKSON: Defendant will stand with the

. . . . . .

THE COURT: Well, you cast it in terms of the urn with the black and white balls in it so we will stay away from any of this business of the process by which it's done. The hypothetical is as stated to you in terms of eleven black and nine white, and it is a random selection. And the question is what is the probability that six or more black will be selected randomly from seven selections.

THE WITNESS: The answer to that, your Honor, is that if we use a test which is referred to as Fisher's true test, we can come up with the number .0579, with the assumptions that are built into that test.

THE COURT: All right. Put your next question.

BY MR. JACKSON:

Q Directing your attention now to Exhibit AW. From a population of twenty, eleven of whom are over 5 feet 8 inches in height and nine of whom are under 5 feet 8 inches in height, what is the probability that six or more individuals under 5 foot eight inches —

A. The question is over.

Q. I'm sorry. Over 5 foot 8 inches. I'm sorry.

— are selected, given a total of seven selections, and assuming random sampling?

MR. ROTH: Objection. He didn't read the question as written, your Honor.

THE COURT: Overruled.

You may answer.

MR. ROTH: Do you — I respectfully ask that the question be re — the Court have the question reread since I mistakenly assumed we were going to have what is written here, and I'm not sure what the question is, your Honor.

THE COURT: Do you understand the question, Dr. Pfeffer?

THE WITNESS: I understand the question, sir. And the question has been changed from what was presented.

THE COURT: Mr. Jackson, why do you deviate from the written submissions of last evening?

MR. JACKSON: Your Honor, the written submission did not include the term "random." I am simply putting that in so that — for the ease of this witness.

THE COURT: All right. Hold on.

Do you understand that what you have just been asked is identical to that which was submitted to you last night, marked as Exhibit AW, except that the word "random" has been added?

THE WITNESS: That's correct, sir. I understand that now, sir.

THE COURT: All right.

THE WITNESS: And that —

THE COURT: All right. You proceed to answer the question. Do you have it in mind? Do you understand it?

THE WITNESS: Yes, I do.

THE COURT: All right. You go ahead and answer it.

THE WITNESS: Given the assumptions that this is random, and given the assumptions which I must take from the exhibit because I have not had access to the tables since last night, by approximation I would have to assume that the number would be approximately .0579 as shown.

I was only able to approximate it because the Fisher table that is probably the basis for deriving this probability is part of a collection of statistical tables published in England to which we would not have access except with library research, your Honor.

THE COURT: All right.

Put your next question.

BY MR. JACKSON:

Q. Directing your attention to Exhibit AY. From a population of twenty, eight of whom weigh —

A. Is this AY?

Q. AY.

A. Yes, sir.

Q. — eight of whom weigh 155 pounds or more, and twelve of whom weigh under 155 pounds, what is the probability that six or more individuals in the 155-and-over category are selected, given a total of seven selections, and assuming, I insert, random sampling without replacement?

A. Your Honor, I did not have an opportunity to work this problem out, except in terms of laying other methodology for it. But I would have to estimate that again an approximation to the Fisher table, which was not available to me, would be of the order of .0044 as shown. Without having access to the arithmetic, I would have difficulty in verifying that number; but the order of magnitude appears correct.

THE COURT: The fact that the population is described in terms of height or weight or color doesn't matter at all for the purpose of coming to your statistical answer, does it?

THE WITNESS: That's correct, sir.

Two of the illustrations are exact illustrations with just that variable.

MR. JACKSON: That is correct.

BY MR. JACKSON:

Q. Now, directing your attention to Exhibit AX. From a population of twenty, twelve of whom are males and eight

of whom are females, what is the probability that six or more males are selected given a total of seven selections and assuming sampling — excuse me — assuming random sampling without replacement?

A. Again, your Honor, if we're assuming random sampling, the estimate for a Fisher true test table would be of the order of magnitude of .1056. Again it's only an estimate on my part.

Q. And that is what —

A. Without access to the calculations or to the table. It's of that order of magnitude.

Q. And that probability is set forth on Exhibit AY?

A. That would be the order of magnitude.

Q. AY?

A. Yes.